Filed 11/14/03 P. v. Antuzzi CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ALLEN ANTUZZI, Defendant and Appellant.	H024434 (Santa Clara County Super. Ct. No. CC080481)

Defendant Richard Allen Antuzzi appeals after conviction, by jury trial, of annoying or molesting a child (Pen. Code, § 647.6, subd. (a)).[1] He was placed on probation for three years, with a 10-month county jail sentence.

On appeal, defendant contends (1) the trial court precluded his right to cross-examine the victim; (2) the trial court gave conflicting jury instructions on the mental state required for a conviction under section 647.6, subdivision (a); (3) the evidence was insufficient to support his conviction under section 647.6, subdivision (a); and (4) the cumulative effect of the errors warrants reversal.

We will affirm the judgment.

[1] Unspecified section references are to the Penal Code.

I. BACKGROUND

We set forth the facts underlying defendant's offense in the light most favorable to the judgment. (See *People v. Valencia* (2002) 28 Cal.4th 1, 4.)

One afternoon in late September of 1999, the victim (age 15) was waiting at a bus stop in San Jose. She was on her way to a doctor's appointment. She had stayed home from school that day due to a stomach ache. She was living with her grandfather at the time.

While standing at the bus stop, the victim started to hitchhike. Defendant (age 42) stopped and offered her a ride. Defendant bought the victim some cigarettes, which she smoked in defendant's pickup truck. On the drive, defendant and the victim talked about the victim's "sexual experience." Defendant also talked about his own sexual experiences.

Defendant asked the victim how old she was. The victim told him that she was 15 years old.

Defendant asked the victim if she wanted to take some pictures, meaning nude photographs. Needing money, the victim asked, "Will I get paid[?]" Defendant said he would pay the victim but did not specify an amount at the time. However, when they reached the doctor's office, the victim asked defendant for five dollars to cover her co-payment. Defendant gave her the money and agreed to wait for her during the doctor's appointment.

The victim entered a building of Kaiser Hospital near a sign that read "Child and Adolescent Services." After her appointment, the victim got back into defendant's truck. Defendant drove to his house.

When they arrived, defendant obtained a camera. The victim took off her clothes near the spa on defendant's patio. Defendant wanted the victim to get into the spa, but the victim said it was too cold. Defendant took photographs of the victim lying on her side on the spa. The victim changed positions for the different photographs, getting into

various sexual poses. Defendant did not direct the victim to get into any particular pose; the victim did the poses on her own.

After taking photographs at the spa, defendant and the victim went into the living room, where defendant took more photographs of the victim. The victim posed in a sitting position, with her legs "wide open" and her hands on the floor.

The victim and defendant next went into the bathroom. Defendant asked the victim to pose inside the shower; the victim complied. After taking this set of photographs, the victim got dressed in a guest room.

After getting dressed, the victim went to the living room. Defendant appeared, wearing only tight spandex shorts. (Defendant had previously been wearing pants and a t-shirt.) Defendant then took the spandex shorts off, revealing an erect penis. Defendant asked the victim to take photographs of him. When the victim said "No," defendant grabbed her legs and "pulled [her] on to him" so they were lying on the floor. Defendant asked the victim, "Will you have sex with me[?]" The victim said, "I want to go home."

Defendant got up and got dressed. The victim asked for her money, and defendant gave her 40 dollars. Defendant then took the victim home. Defendant gave the victim his cell phone number.

The day after the incident, the victim called defendant because she wanted him to give her the photographs. Defendant did not answer the phone, so the victim left a message with her phone number. Defendant did not call back.

Two days after the incident, the victim told her cousin David what had happened. About a month after the incident, the victim's grandfather learned of the incident. He took the victim to the sheriff's department, where they spoke to Deputy William Wilson.

According to Deputy Wilson, upon first impression, the victim appeared to be 16 or 17 years old. However, after speaking with her, he would have guessed that she was 11 or 12 years old.

Because her grandfather was present, the victim left out some details during the initial interview, such as the fact that she had been hitchhiking. She did not want her grandfather to know about how she posed for the photographs, so she stated that she was inside the spa. The victim also stated that she had gone to school that day, but left early for her doctor's appointment.

Observing that the victim appeared nervous around her grandfather, Deputy Wilson asked the victim's grandfather to step outside the room. At that point, the victim calmed down and provided more truthful details about what had happened. The victim told Deputy Wilson that defendant offered her a ride from the bus stop to her doctor's appointment, that she told defendant of her sexual exploits, and that she asked defendant for five dollars to pay for her appointment. After the appointment, defendant took her to his home, asking if she would pose nude for him. The victim told Deputy Wilson about posing in the spa and in the shower. She said that while she was posing, defendant had told her "she had done a good job." The victim told Deputy Wilson that after she got dressed, she encountered defendant sitting on the floor naked. Defendant asked the victim if any of her friends "would be interested in coming out for a threesome." Defendant also asked the victim "if she would have sex with him." When he asked her this question, he pulled her onto him. The victim told Deputy Wilson that defendant did not return her phone calls regarding the photographs.

A few days after speaking with Deputy Wilson, the victim was interviewed by Sergeant Rick Sprain. Sergeant Sprain opined that the victim appeared about 15 or 16 years old, but spoke and acted in an immature manner.

After identifying defendant in a photographic lineup, the victim told Sergeant Sprain what had happened. She said she had stayed home from school because she was "feeling ill" and had made an appointment at Kaiser. Defendant pulled up to the bus stop and offered her a ride. Defendant asked how old she was and about her friends. The victim said she was 15 years old and that she had some female bisexual friends.

Defendant and the victim both talked about their sexual experiences. Defendant asked if the victim had ever posed for photographs and asked if she wanted to. The victim asked if she would get paid; defendant said yes. Defendant gave the victim five dollars for her appointment and waited for her. When she got back into his car, he asked if she still wanted to pose for photographs. The victim agreed, and they proceeded to defendant's house. The first photographs were taken by the spa. The victim had only removed her shirt and bra at that point. Defendant told her to remove the rest of her clothing before taking photographs in the living room and the bathroom. After getting dressed, the victim encountered defendant wearing spandex shorts. Defendant asked if she would take photographs of him. He also suggested the victim bring a girlfriend over for a threesome. Defendant took his shorts off and tried to pull the victim on top of her. The victim told him to stop, and he did. Defendant got dressed, gave her 40 dollars, and drove her home, leaving her his cell phone number. The victim tried calling to get the photographs, but defendant never returned her calls.

Under the direction of Sergeant Sprain, the victim called defendant's cell phone and left a message, asking defendant to call her back because she wanted "to see those pictures." Defendant called back within a few minutes; his conversation with the victim was tape-recorded.

During the recorded conversation, defendant said he had "been trying to get a hold of" the victim for the past two weeks. The victim asked defendant when she would get paid for the photographs. Defendant said, "[a]s soon as I get them developed," explaining that he had been on vacation. Defendant asked the victim if she wanted to get together that night; he offered to give her money and to pick her up. The victim asked what defendant wanted to do. Defendant replied, "We'll figure something out. Ah, something wild." The victim asked defendant how she had done "in the pictures." Defendant responded, "Good. Really good." Defendant asked if the victim had talked to

any of her girlfriends yet. At the end of the conversation, defendant and the victim arranged to meet at 5:00 p.m. that evening.

Sergeant Sprain contacted defendant at his home shortly afterwards. Sergeant Sprain told defendant he was not under arrest and did not have to talk. Sergeant Sprain named the victim, stated that she was 15 years old, and asked if defendant knew her. Defendant said he did not. Sergeant Sprain then played the tape recording of defendant's earlier conversation with the victim. Defendant "asked who the voices were on that tape," pretending not to know that it was him and the victim.

After interviewing defendant, Sergeant Sprain started to leave, intending to obtain a search warrant. However, defendant flagged him down, saying that "he wanted to set the record straight." Defendant admitted picking up the victim and taking her to the doctor's appointment. Defendant claimed that during the drive, the victim told him she was 19 years old. The victim asked him to take photographs of her for her modeling portfolio. He had taken some topless photographs of the victim near his spa. He took additional photographs of the victim in the living room; in these photos she had removed everything but her panties. Defendant claimed he had thrown the film away. No photographs were ever recovered.

Defendant was charged, by second amended information, with one count of using a minor to pose or model sexual conduct (§ 311.4, subd. (c)) and one count of annoying or molesting a child (§ 647.6, subd. (a)). A first trial ended in a mistrial.

At the second trial, defendant testified that he saw the victim walking along Monterey Road with her thumb out. He offered her a ride. The victim began telling him all about herself. She described having sex with her boyfriend that day and about having her girlfriends watch them. The victim stated that she needed money.

Defendant denied ever asking the victim to participate in a threesome, but he admitted asking the victim if any of her friends might want to be set up with his friends. The victim told defendant that she wanted to be a stripper like her mother and that she

wanted to make adult movies. She said she wanted to find someone to take topless photographs of her in order to create a portfolio. She asked defendant if he would do it.

Defendant testified that the victim appeared to be between 18 and 20 years old. She was wearing tight clothing and makeup. She told him that she was 19 years old. She was very confident when talking to him. Defendant admitted being attracted to the victim and wanting her to like him.

According to defendant, the victim asked him to wait while she went to her appointment. When she got back into his truck, she again asked defendant about taking photographs of her. Defendant agreed. He denied that he ever offered to give her any money for the photographs.

The victim asked defendant if they could go to his house. Defendant got a camera while the victim took her top off outside by the spa. The victim told him to take a picture of her and posed. Defendant tried to tell her that he had no film, but the victim continued to talk and laugh, so he aimed and snapped the camera.

The victim then went inside defendant's house, where his cat jumped on her. The victim stated that she was allergic to cats and went into the bathroom. When she came out of the bathroom, her pants were off and she was trying to clean them of cat hair. The victim sat on the floor and told defendant to take a picture of her. Defendant clicked the camera. Defendant then went to change clothes. When he returned, the victim wanted to go home.

Defendant admitted asking the victim to have sex with him at some point during the encounter, but he denied that he ever touched the victim. He also denied that he was ever naked around the victim, or that he asked her to photograph him. Defendant denied ever receiving a telephone call from the victim other than the day of the pretextual call.

Defendant testified that when contacted by Sergeant Sprain, he originally denied knowing the victim because Sergeant Sprain referred to a "fifteen year old girl."

Defendant was scared that he could get into trouble "for being around a girl that was under age."

The jury found defendant not guilty of using a minor to pose or model sexual conduct (§ 311.4, subd. (c)) but convicted him of annoying or molesting a child (§ 647.6, subd. (a)). At sentencing, the trial court placed defendant on probation for three years and imposed a 10-month jail sentence.

II. DISCUSSION

A. Restriction of Cross-Examination

At the beginning of the second trial, the prosecution moved in limine to preclude the defense from presenting evidence that the victim was going to see a psychiatrist on the day she met defendant.

Defendant argued that the evidence was relevant to the victim's "ability to perceive or recall" events. He argued: "Her memory is very bad. She's had a number of inconsistent statements on very material points in this case, and we believe that's consistent with her having a psychiatric problem on the day of the incident . . . ."

The trial court ruled that the victim could be asked "questions about poor memory," but that there could not be "any reference to a psychiatrist or psychiatric problem on the part of the victim as it is not relevant." The trial court explained, "I don't see a nexus or a link between going to a particular type of doctor and one's credibility." The trial court found that evidence that the victim went to see a psychiatrist would "possibly inflame or prejudice the jury against the victim . . . ." (See Evid. Code, § 352.)

Defendant contends the trial court's ruling was erroneous. He claims the evidence would have shown that the victim "needed immediate psychiatric intervention" on the day in question and that such evidence was relevant to how her perception of the events was affected by her mental and emotional state of mind.

We review the trial court's ruling excluding the evidence as irrelevant and unduly prejudicial under the deferential abuse of discretion standard. (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

We first note that the record fails to support defendant's assertion that the victim "needed immediate psychiatric intervention" on the day in question. The record suggests that the victim's appointment had been set in advance. The victim testified that she had visited the same doctor's office fifteen times over a period of several months, indicating that she saw the doctor on a regular basis.

Even assuming that the evidence had some relevance to the victim's credibility, and that it should have been admitted, we would find no prejudice. If error, it did not deprive defendant of his federal constitutional right of confrontation. (U.S. Const., 6th Amend.) "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." (*People v. Hall* (1986) 41 Cal.3d 826, 834.) Defendant was permitted to cross-examine the victim extensively about her poor memory, and the jury was aware that the victim felt ill enough to stay home from school that day. The victim's credibility was established by the fact that her testimony about the incidents was consistent with her statements to Deputy Wilson and Sergeant Sprain. Moreover, her testimony was generally consistent with defendant's testimony: defendant admitted taking the victim to his house, taking (or pretending to take) photographs of her in sexual poses, and asking her to have sex with him. The only real dispute at trial was whether the victim told defendant that she was 15 years old or 19 years old, and whether defendant believed she was over 18 years old. Deputy Wilson and Sergeant Sprain both testified that upon meeting the victim, they would not have believed that she was over 18 years old. On this record, it is not reasonably probable that the verdict would have been more favorable to defendant had the jury learned that the victim's appointment was with a psychiatrist. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. Instructions on Mental State for section 647.6, subdivision (a)

Pursuant to CALJIC No. 16.440, the trial court correctly instructed the jury on the elements of section 647.6 as follows: "Every person who annoys or molests any child under the age of eighteen years is guilty of a violation of Penal Code section 647.6, a misdemeanor. [¶] In order to prove such crime, each of the following elements must be proved. There are two: [¶] One, a person engaged in acts or conduct directed at a child under the age of eighteen years which would unhesitatingly disturb or irritate a normal person if directed at that person; [¶] And two, the acts or conduct were motivated by an unnatural or abnormal sexual interest in the alleged child victim. [¶] It is not necessary that the acts or conduct actually disturb or irritate the child or that the body of the child be actually touched."

The trial court also instructed the jury pursuant to CALJIC No. 2.51, as follows: "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to establish the defendant is not guilty."

Relying on *People v. Maurer* (1995) 32 Cal.App.4th 1121 (*Maurer*), defendant contends these instructions were conflicting – because CALJIC No. 16.440 told the jury that motive was an element of the crime, while CALJIC No. 2.51 told the jury that motive was not an element of the crime – and that the error in giving both instructions was prejudicial.

In *Maurer,* the defendant – a high school teacher – was charged with "22 counts of improper sexual conduct" involving three of his students. He was acquitted of all charges except for two counts of violating section 647.6. At trial, the jury had been instructed pursuant to both CALJIC No. 16.440 and CALJIC No. 2.51. On appeal, the defendant claimed these instructions were conflicting. Noting that "the audience for these

instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms," the court agreed that "the trial court erred by not excluding the section 647.6 offenses from the motive instruction of CALJIC No. 2.51." (*Maurer, supra*, 32 Cal.App.4th at p. 1127.)

The *Maurer* court explained that the error should be evaluated under the "harmless beyond a reasonable doubt standard" of *Chapman v. California* (1967) 386 U.S. 18, 24, because "if some jurors here chose to follow CALJIC No. 2.51 regarding the section 647.6 offenses, this would have removed the mental state element from these offenses." (*Maurer, supra,* 32 Cal.App.4th at p. 1129.)

The *Maurer* court ultimately found that the error in giving the conflicting instructions was prejudicial. In that case, the violations of section 647.6 were based on the defendant's statements to the victim: he described "a dream in which he was caught naked with her in bed," and he described "a past incident where he digitally penetrated an older woman." (*Maurer, supra,* 32 Cal.App.4th at p. 1125.) According to the victim and several of her classmates, the defendant frequently made sexual jokes and comments to the entire class, including sexual comments and jokes about the victim. The defendant also had private conversations with the victim about their respective sex lives, but he had never tried to touch or seduce the victim.

The court analyzed the prejudicial effect of the conflicting instructions as follows: "The evidence shows that [the victim] and defendant were confidants and freely discussed sexual and nonsexual matters, sometimes in a counseling mode. [The victim] frankly and openly discussed sexual matters with others. Defendant and [the victim] were very close and spent a lot of time privately, yet defendant never touched her in a sexual manner and never tried to seduce her. Defendant's sexual comments were almost always made in front of the whole class, which included boys as well as girls, and were usually uttered in a joking way. As for defendant's two convictions involving [the victim], one count arose from defendant joining a conversation between [the victim] and

[her friend] and offering his experience with an *older* woman. On the other count, [the victim] said she had to pry the details out of defendant. Contrary to the Attorney General's argument, it is tenable, on this evidence, that a juror here could have determined that defendant's conduct was motivated by other than an unnatural or abnormal sexual interest in [the victim.] Thus, CALJIC No. 2.51 was not rendered irrelevant; in other words, we cannot say this 'erroneous instruction "must have made no difference in reaching the verdict obtained." ' [Citations.]" (*Maurer, supra,* 32 Cal.App.4th at pp. 1131 –1132, original italics.)[2]

The People argue that *Maurer* was wrongly decided and urge us not to follow it. The People contend that the *Maurer* court failed to apply the presumption that "jurors are intelligent persons capable of understanding and correlating all jury instructions that are given. [Citations.]" (*People v. Phillips* (1985) 41 Cal.3d 29, 58.) Pointing out that the jury was instructed to "[c]onsider the instructions as a whole and each in light of all the others" (CALJIC No. 1.01), the People argue that a reasonably intelligent jury would understand that CALJIC No. 2.51 applied only to the charge of violating section 311.4, subdivision (c), and that it did not apply to the charge of violating section 647.6.

In this case, any error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) The facts of this case differ dramatically from those in *Maurer*. Here, defendant and the victim were complete strangers; they had no pre-existing relationship. Defendant admitted being attracted to the victim and admitted asking her to have sex with him while she was posing for photographs in sexual poses. The victim testified that defendant was naked, with an erection, when he asked her for sex. Defendant's primary defense was that he believed the victim was 19 years old. In light of the record in this case, we believe no reasonable juror could have concluded that

---

[2] One of the comments to CALJIC No. 16.440 provides, with a citation to *Maurer*: "It is error to give CALJIC 2.51 (motive) in a prosecution for violation of Penal Code § 647.6, and may under some circumstances constitute prejudicial error. [Citation.]"

defendant's actions were motivated by anything other than "an unnatural or abnormal sexual interest" in the victim. (CALJIC No. 16.440; see *In re Gladys R.* (1970) 1 Cal.3d 855, 867-868.)

C. Sufficiency of the Evidence

Defendant contends the evidence was insufficient to support his conviction of violating section 647.6, subdivision (a). He claims that he did not engage in conduct that would "unhesitatingly disturb or irritate a normal person." (CALJIC No. 16.440; see *People v. Carskaddon* (1957) 49 Cal.2d 423, 426.)

In determining whether the evidence is sufficient to support a conviction, we "review 'the whole record in the light most favorable to the judgment' and decide 'whether it discloses substantial evidence ... such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Johnson* [1980] 26 Cal.3d 557, 578.) Under this standard, the court does not ' "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.)" (*People v. Hatch* (2000) 22 Cal.4th 260, 272, original italics.)

"[T]o determine whether the defendant's conduct would unhesitatingly irritate or disturb a normal person, we employ an *objective* test not dependent on whether the child was in fact irritated or disturbed. [Citations.]" (*People v. Lopez* (1998) 19 Cal.4th 282, 290, original italics.)

Defendant asserts, "There is nothing harmful or offensive, let alone unhesitatingly harmful or offensive, about being asked to pose nude or to have sex." Here defendant did more than simply ask the victim to pose for nude photographs and to have sex. Defendant took the victim to his home-a secluded location, and took nude photographs of

her in various poses. Here, while the evidence suggests the victim was a willing participant in posing for the photographs, that is *all* that the evidence suggests that the victim wanted to do. Nonetheless, after taking the photographs, defendant took off his own clothes, revealing an erection, asked the victim to take nude photographs of him, pulled her onto his naked body, and asked her to have sex with him. Defendant's exposure of his penis, alone, could support the conviction. (See *Lopez, supra,* 19 Cal.4th at p. 291 [stating that in *People v. McNair* (1955) 130 Cal.App.2d 696, the defendant's act of exposing himself "to a seven-year-old child in a public place" was "conduct that would irritate or disturb any normal person"].) Here, defendant did more than simply expose himself. While no touching is necessary to constitute a violation of section 647.6, subdivision (a) (*id.* at p. 289), defendant's act of pulling the victim onto his naked body and asking her for sex was clearly conduct that would disturb or irritate a normal person.

We conclude substantial evidence supports defendant's conviction.

D. Cumulative Prejudice

Finally, defendant claims that even if none of the alleged errors, alone, was prejudicial, their cumulative effect warrants reversal. (See *People v. Hill* (1998) 17 Cal.4th 800, 844-845.) We disagree. Even assuming that the trial court should have allowed evidence that the victim had an appointment with a psychiatrist on the day she met defendant, and that the trial court erred by giving conflicting instructions on the mental state required for a violation of section 647.6, reversal would not be warranted. Considering these alleged errors collectively, in view of the entire record we conclude that "on this record the whole of them did not outweigh the sum of their parts." (*People v. Roberts* (1992) 2 Cal.4th 271, 326.)

III. DISPOSITION

The judgment is affirmed.

_____
BAMATTRE-MANOUKIAN, J.

WE CONCUR:

_____
RUSHING, P.J.

_____
PREMO, J.